United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-7664

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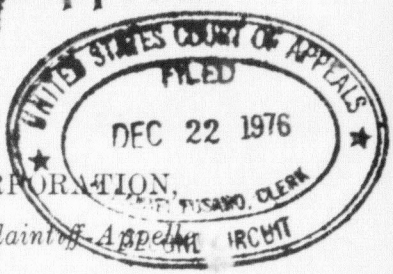

CHAMPION INTERNATIONAL CORPORATION,

Plaintiff-Appellee,

against

CONTINENTAL CASUALTY COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

PETITION FOR REHEARING and SUGGESTION FOR REHEARING *IN BANC*

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PETITION FOR REHEARING and SUGGESTION FOR REHEARING *IN BANC*

Defendant-Appellant Continental Casualty Company ("Continental") (a) respectfully petitions the Court for rehearing of the captioned appeal, and (b) respectfully suggests the appropriateness of a rehearing *in banc.*

Petition for Rehearing

The appeal concerns coverage provided to plaintiff-appellee Champion International Corporation ("Champion") by annual Comprehensive General Liability policies issued by Liberty Mutual Insurance Company ("Liberty Mutual") and an Umbrella Excess policy issued by Continental

for products liability losses allegedly exceeding $1,105,000 incurred when vinyl laminated panels, in differing thickness and styles (JA 370), purchased by Champion over a period of time, sold in small lots by Champion over a period of time to twenty-six manufacturers (JA 238), and installed by the different manufacturers over a period of time and in various parts of the country in over 1400 vehicles such as houseboats, housetrailers and campers, proved to be defective and delaminated (JA 159). Each annual Liberty Mutual's policy provided coverage to the extent of "$100,000 each occurrence; $200,000 aggregate", subject to a $5,000 "per occurrence" deductible for property damage liability arising from Champion's products (JA 490a, 510-511). After the exhaustion of the coverage of the Liberty Mutual policies, Continental's Umbrella Excess policy provided coverage of $1 million "per occurrence" and $1 million in the aggregate in each annual period (JA 447). The damage to no one vehicle exceeded $5,000 (JA 159). The District Court held that there was but one "occurrence" and that after application of one $5,000 deductible and payment by Liberty Mutual of its $100,000 "one occurrence" limit, Continental was required to pay its one occurrence limit of $1 million. This Court, with one dissent, affirmed.

Continental petitions this Court for rehearing of the captioned appeal upon the grounds that the majority opinion affirming the judgment below overlooked or misapprehended the following points of law and fact:

1. This is a diversity case. As the District Court found: "The contested provisions of both the Liberty and Continental policies are standard ones. They are in similar policies issued by many companies" (JA 164). New York cases have consistently held that the terms "accident" and "occurrence" as used in liability policies refer not to the proxi-

mate cause of the personal injury or property damage but rather to the event giving rise to the claim, *i.e.*, the actual infliction of the personal injury or property damage. *Hartford Accident & Indemnity Company* v. *Wesolowski*, 33 N.Y. 2d 169, 350 N.Y.S.2d 895, 305 N.E.2d 907 (1973); *Arthur A. Johnson Corporation* v. *Indemnity Insurance Company of North America*, 7 N.Y.2d 222, 196 N.Y.S.2d 678, 164 N.E. 2d 704 (1959). The same cases correspondingly have rejected the notion that there is a single "accident" or "occurrence" where one negligent act or omission is the sole proximate cause of all resultant injury or damage and have held that separate events inflicting injury or damage at different times and at different places are separate "occurrences" or "accidents".

In these circumstances, we respectfully submit (1) that the substantive law of New York controls (2) that the majority was not warranted in refusing to follow the New York law on the ground that "resort to state rules governing the construction of ambiguous insurance policies [is not necessary] since * * * the terms of the policies in question are not ambiguous," Slip Op. at 6051, note 5, and (3) that the majority erred in holding, contrary to the New York authorities, that "the cause of Champion's damage, namely, the delivery of defective panels, is the 'occurrence' ", Slip Op. at 6048, and that the policies were intended to gauge coverage not "on the basis of individual accidents giving rise to claims, but rather on the underlying circumstances which resulted in the claim for damages". Slip Op. at 6050.

2. The clause in the Liberty Mutual policies providing that, for purposes of applying the policies' limits of liability, "all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions * * * shall be considered as arising out of

one occurrence'' (JA 492, 499) must be read in conjunction with the policies' definition of an ''occurrence'' as ''*an accident including* injurious exposure to conditions which results, during the policy period, in bodily injury or property damage * * *'' (JA 493, 500) (emphasis added). When this is done, it is clear that the ''exposure'' referred to is not exposure of the insured to legal liability but rather exposure of other persons and property to the harmful effects of the defective product with resultant physical injury or damage.

We therefore respectfully submit that the majority erred in holding that Champion's many sales of defective panels to twenty-six manufacturers throughout the country at different times constituted ''exposure'' to substantially the same conditions, Slip Op. at 6051, since (1) even if panels could be described as ''conditions'' (see dissent, Slip Op. at 6054-6055) other property was not exposed to damage unless and until the panels were installed in vehicles and commenced to delaminate, and (2) the delaminations of different panels in different vehicles at different times and in different places, while similar, could in no respect be described as the ''same''.

3. There is nothing in logic or the language of the policy which precludes one event or ''occurrence'' from giving rise to only one claim.

We respectfully submit that the majority overlooked this point in holding that the Liberty Mutual policy's designation of a ''per occurrence'' deductible rather than a ''per claim'' deductible ''indicates that the policy was not intended to gauge coverage on the basis of individual accidents giving rise to claims, but rather on the underlying circumstances which resulted in the claim for damages''. Slip Op. at 6050. As noted in the dissent, one

"accident" or "occurrence" can give rise to many claims. Slip Op. at 6053. Therefore, the fact that the policy has a "per occurrence" deductible rather than a "per claim" deductible is of no help in determining whether there has been one occurrence or many occurrences. In addition, the policy's definition of "occurrence" as "an accident * * *" refutes the majority's holding that the designation of a "per occurrence" deductible establishes that the coverage was not intended to be "on the basis of individual accidents".

Further, this holding renders meaningless several other clauses of the policy (see Continental's reply brief, pp. 19-21) including the clause setting forth the "Insured's Duties In The Event Of Occurrence, Claim Or Suit" (JA 494, 514). Surely it cannot be contended that the insured was required to give notice to its insurers of all the sales and deliveries it made.

4. The District Court, in *Stauffer Chemical Company* v. *Insurance Company of North America*, 372 F. Supp. 1303 (S.D.N.Y., 1973), the only case cited by the majority in support of its reasoning, held only that injury to or destruction of crops of third parties for which the insured was liable was a covered "occurrence" (or "occurrences") whether the damage resulted from the passive failure of the insured's product to perform its function (*e.g.*, killing cornear worms) or the active agency of the insured product (*e.g.*, damaging lettuce leaves). The Court in *Stauffer* did not consider the number of occurrences involved since the issue of damages, including the application of the policy's limits of liability, was specifically reserved for later determination. 372 F. Supp. at 1305.

We respectfully submit that the majority misapprehended the issue presented in *Stauffer* and the holding of that case when it asserted that the situation in *Stauffer*

was analogous to the instant case, Slip Op. at 6050, note 3, and supported the majority's holding that all property damage, no matter when or where it occurs, is but one occurrence if the underlying circumstances, *i.e.*, the causes, are similar.

5. Both Continental's excess policy and Liberty Mutual's underlying policies provided coverage only for property damage which occurred during their respective policy periods (JA 449, 451, 492). The underlying Liberty Mutual policies which had to be exhausted before Continental's excess policy could be called upon, provided such coverage to the extent of $100,000 for each occurrence and $200,000 in the aggregate in each annual period (JA 490a).

It is respectfully submitted that the majority's statement that "whether the property damage occurred *during* the policy period is a factual question which was resolved in Champion's favor below", Slip Op. at 6051, finds no support in the record. While the District Court found that "in 1969 and 1970, Champion bought a large number of vinyl covered panels" and "then sold the panels to many manufacturers" (JA 159), the District Court made no finding as to when the delaminations in the vehicles occurred since, having held "there was one occurrence which proximately resulted in damage to many vehicles" (JA 164-165), the District Court regarded as immaterial the times when the damage to the various vehicles took place, whether within or without the policy period, and merely found that "As of September 13, 1974 [more than three and a half years after the end of Continental's policy period], plaintiff paid Liberty Mutual a total of $1,513,116.82 for the settlement of the claims for property damage in connection with the delamination of the defective vinyl-covered panels" (JA 303). Without findings as to when the actual property damage occurred, there is no basis for holding that the

damage is within Continental's policy period, or for determining which and how many of the annual Liberty Mutual policies must respond before the coverage of Continental's policy is reached.

By reason of the foregoing, it is respectfully submitted that Continental's petition for rehearing should be granted and, upon such rehearing, judgment should be entered (1) vacating the judgment entered in this Court on December 9, 1976, (2) reversing the judgment below, and (3) dismissing the complaint.

Suggestion for Rehearing *in Banc*

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Continental respectfully suggests that a rehearing *in banc* would be appropriate in the instant case for both of the reasons stated in the Rule.

1. Consideration by the full Court is necessary to secure and maintain uniformity of its decisions.

The majority's decision, we believe, is at variance with two prior decisions of this Court, namely, *The Home Insurance Company* v. *The Aetna Casualty and Surety Company*, 528 F. 2d 1388 (2nd Cir., 1976), and *Palardy* v. *Canadian Universal Insurance Company*, 360 F. 2d 1007 (2nd Cir., 1966).

In *Home*, this Court had before it the same definition of "occurrence" as appears in the instant case. 528 F.2d at 1389. We submit that this Court implicitly but unmistakably approved (1) the District Court's thorough analysis of the meaning of "occurrence" and the manner of determining the number of "occurrences" in a given case, and (2) the District Court's conclusion that the "occurrence" is the event "in the causal claim which *immediately* preceded or occurred simultaneously with the damage" and that such events distinguishable in time and space, one of

which does not cause the other, are separate "occurrences". Index No. 74 Civ. 4164, Opinion No. 42,308 (S.D.N.Y., April 24, 1975).

In *Palardy*, this Court held that a liability policy covered not the manufacture or sale during the policy period of defective products which might in the future cause accidents, but only accidents which happen during the policy period. This, we submit, is a clear holding that a sale is not the "accident" or "occurrence" referred to in a liability policy.

It seems appropriate to note that the majority's decision is also at variance with controlling decisions of the New York Court of Appeals, *Arthur A. Johnson Corporation* v. *Indemnity Insurance Company of North America, supra, Hartford Accident & Indemnity Company* v. *Wesolowski, supra,* and with decisions of the Courts of Appeals for the Fifth, Sixth, Seventh, Eighth and Ninth Circuits. *Ketona Chemical Corporation* v. *Globe Indemnity Company,* 404 F.2d 181 (5th Cir., 1968); *Maurice Pincoffs Company* v. *St. Paul Fire and Marine Insurance Company,* 447 F.2d 204 (5th Cir., 1971); *Elston-Richards Storage Company* v. *Indemnity Insurance Company of North America,* 194 F. Supp. 673 (W.D. Mich., 1960), aff'd on opinion below, 291 F.2d 627 (6th Cir., 1961); *Hamilton Die Cast, Inc.* v. *United States Fidelity and Guaranty Company,* 508 F.2d 417 (7th Cir., 1975); *Hagen Supply Corporation* v. *Iowa National Mutual Insurance Company,* 331 F.2d 199 (8th Cir., 1964); *Brown* v. *First Insurance Company of Hawaii,* 424 F.2d 680 (9th Cir., 1970).

2. This appeal involves a question of exceptional importance.

We believe that this Court may take judicial notice of the fact that a "crisis" exists in the area of products lia-

bility claims and the availability of insurance coverage for such claims. The opening paragraph of a recent release from the office of the Secretary of Commerce entitled "Interagency Task Force on Product Liability—Scope of Research Being Conducted on Products Liability" stated as follows:

> "An Interagency Task Force on Product Liability, chaired by the Under Secretary of Commerce, is studying the impact of products liability claims on the economy. Preliminary evidence suggests that the number and size of product liability claims have increased substantially in recent years, that premiums for products liability insurance have risen sharply, that many manufacturers are experiencing difficulty in obtaining products liability insurance, and that small business have been particularly affected" 41 Fed. Reg. 40529 (Sept. 20, 1976).

As found by the District Court, the clauses construed in this case are standard clauses of standard Comprehensive General Liability policies (JA 164). It is common knowledge that Comprehensive General Liability policies are among the most extensively issued commercial insurance policies. It is of exceptional importance that the Interagency Task Force have a definitive understanding of the coverage afforded by these standard policies which it is investigating.

It is also of exceptional importance that insurers and insureds know whether the "occurrence" is, as the majority held, "the delivery of defective [products]", Slip Op. at 6048, or, as the dissent stated, the "damage that occurs when people or property are physically exposed to some injurious phenomenon". Slip Op. at 6054. The majority perhaps failed to give sufficient weight to the fact that the fortuity of a series of small claims, each falling

below the deductible amount, has resulted in Champion's urging the opposite contention from that normally advanced by an insured. It is simply inconceivable that, if one of Champion's other products such as food packagings, pharmaceuticals or cosmetics (Exhibit 8, tab 6) had been contaminated causing serious bodily injuries, or if the panels, instead of merely delaminating, had been highly flammable causing numerous fires in many vehicles in various parts of the country over a period of at least two years resulting in serious property damage and bodily injuries, Champion would insist that its coverage was limited to "one occurrence" in one annual period. And, as noted by the dissent, the majority's adoption of Champion's strained position may lead "to the denial to many insureds of substantial payments to which they are entitled." Slip Op. at 6052.

Finally, the majority's decision is clearly a minority view which may lead to unseemly "Court shopping" as insureds and insurers seek out the State Courts or Federal Courts in Circuits most compatible with their positions in particular cases.

By reason of the foregoing it is respectfully suggested that this appeal be reheard *in banc*.

Respectfully submitted,

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